***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 75-7029

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LEONARD ANDREWS, ET AL

Plaintiff-Appellants

v.

NICHOLAS NORTON, ET AL

Defendant-Appellees

---

On Appeal from a Decision of The

United States District Court,

District of Connecticut

---

BRIEF OF APPELLEE

---



Carl R. Ajello
Attorney General
30 Trinity Street
Hartford, Connecticut

Francis J. MacGregor
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

Federal Cases Cited:

Page

Federal Statutes Cited: Page



Federal Regulations Cited:

## ISSUES PRESENTED

1. Is the refusal of the Defendant, Welfare Commissioner, to reimburse travel and baby sitter expenses to AFDC recipients, who are required to travel less than twenty-five (25) miles to a State Welfare District Office for a redetermination of eligibility interview raise a substantial constitutional claim of denial of due process and equal protection under the Fourteenth Amendment?

2. If there was no substantial constitutional issue raised by the Plaintiff, did the District Court lack jurisdiction to hear the case on the pendent statutory claims?

3. If the Fourteenth Amendment claims are without merit, does the Court have jurisdiction, solely on basis of 28 U.S.C. 1343 (3) and (4), as a Supremacy Clause argument?

## STATEMENT OF THE CASE

1. The Connecticut Welfare Department (C.W.D.) is required by Federal regulations to redetermine the eligibility of AFDC recipients every six (6) months. [45 C.F.R. 206(a)(9)(iii)]

2. In order to reduce errors in redetermining eligibility, because errors could cost the C.W.D. Federal matching funds, the Defendant set up a system of personal interviews for redetermining eligibility which required the supervising relatives of AFDC recipients to personally come in to one of the thirteen (13) district offices located throughout the state.

3. There were approximately 35,000 AFDC families in Connecticut on the date that this civil action was commenced.

4. There are 169 towns in the State of Connecticut.

5. If the recipients lived in a town more than twenty-five (25) miles from the district office which serviced their files, the C.W.D. sent a redetermination of eligibility worker to the Town Hall, or other location in that town, to handle the interview.

6. The reasons why the Defendant did not send eligibility workers into each town was the lack of state cars to transport workers to the various towns; the fact that travel time would lessen the work day during which workers could process the files; that in the district offices the clerks, typists and other supporting personnel would be able to process the redetermination system on a continuous and daily basis; that the files could be easily lost if they were taken out into the field; that other units in the office work from the same file and, therefore, the file is needed to be available to them; and the extra expense of going out to the various towns.

7. The C.W.D. does not reimburse recipients for any travel expenses or baby sitting costs that might be incurred because of the requirement to come to the district office.

8. There was public transportation to each appropriate servicing district office available from the towns in which the named Plaintiffs lived.

9. All the named Plaintiffs were able to get to the district offices for their interview.

10. None of the named Plaintiffs actually incurred any baby sitter expenses.

## ARGUMENT

### I

THE LOWER COURT TESTED THE ALLEGATIONS OF THE APPELLANTS' COMPLAINT IN A HEARING ON THE MERITS.

The Appellants major claim of error is that the District Court found their constitutional claims of denial of equal protection and due process to be insubstantial, and, because of this lack of substantiality, dismissed the complaint for want of subject matter jurisdiction and refused thereafter to hear the pendent statutory claims.

The Appellees agree the correct legal principle by which a District Court must test a complaint, alleging denial of constitutional rights is that "its unsoundness so obviously results from previous decisions of (the Supreme Court) as to foreclose the subject." Exparte Poresky, 290 U.S. 30, 32; is "wholly insubstantial" Bailey v. Patterson, 369 U.S. 31, 33; or is "so attenuated

and insubstantial as to be absolutely devoid of merit..." Baker v. Carr, 369 U.S. 186, 199. See also Goosby v. Osser, 409 U.S. 512, 518; Hagans v. Lavine, 415 U.S. 528, and Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666.

There is a fundamental distinction between how the lower courts in the above-cited Supreme Court cases arrived at their decisions to dismiss the plaintiffs' complaint for lack of substantiality and how the lower court in the present civil action arrived at this decision.

In all of the above-cited Supreme Court cases, the complaints were dismissed while still in the pleading stage with no testimony taken to test the pleadings. In cases, where the Court dismisses a civil action on the pleadings, it is bound to believe all of the allegations of the complaint as true even though they may later not stand that test at the time of trial.

In the present civil action, the Court heard testimony presented by several of the named plaintiffs, along with other witnesses, and thus was able to test the allegations

against the facts found to be proven. The proof fell far short of the claims now raised in the Appellants' brief and clearly showed the constitutional claims to be without merit.

II

THE LOWER COURT CORRECTLY FOUND THE EQUAL PROTECTION CLAIM TO BE LACKING IN SUBSTANTIALITY.

The Appellants equal protection argument is that Connecticut's policy of having all AFDC recipients come in to the district office, which services them, for a redetermination of eligibility interview once every six (6) months creates two (2) classes of needy children. One class receives less than the full level of assistance because it must spend money to travel to the district office plus incurring baby sitting costs in order to remain eligible for public assistance. The other class, it is claimed, gets the full assistance level.

The Appellees would first note that there was no testimony ever presented that any of the plaintiffs had actually incurred any baby sitter expenses. It further appears that none of the named plaintiffs would spend more than $4.00 for a round trip ticket to their appropriate district office. Also, there was public transportation available to all the named plaintiffs. And finally there was no testimony that anybody was removed from welfare because of an inability to get to the district office.

The Appellants agree that the standard for measuring deprivation of equal protection in welfare matters is the one enunciated in Dandridge v. Williams, 397 U.S. 471, 478, where the Maryland maximum grant regulation was upheld. "A statutory discrimination will not be set aside if any state of facts may be conceived to justify it."

Dandridge specifically recognized as a rational basis for state action the allotting of limited welfare funds by state officials in a reasonable manner. Further Dandridge found that this classification does not offend the Constitu-

tion because in practice it might result in some inequality. Dandridge, supra, page 487. See also Jefferson v. Hackney, 406 U.S. 535, 546.

Those cases which cite Dandridge and Jefferson agree that the Fourteenth Amendment does not require the state to equalize economic conditions, nor require absolute equality or precisely equal advantages. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 24. Griffin v. Illinois, 351 U.S. 12, 23.

In the present case, the state, because of limited welfare funds available for distribution, decided not to pay travel expenses to AFDC recipients, who were coming to the district office for redetermination interviews. The impact of this decision by the Welfare Commissioner has a much less adverse financial impact on the recipient than either the Dandridge or Jefferson decisions had on AFDC families. The policy to be achieved in the present case is analogous to the policy sought to be achieved in these

two Supreme Court cases. The decisions in Dandridge and Jefferson, as applied to the facts of this civil action, clearly meets the test applied in Exparte Poresky which is that the Appellants constitutional argument has been shown to be so unsound by previous Supreme Court decisions as to foreclose the subject.

The Appellants argue that their constitutional claims are not insubstantial unless the Supreme Court has foreclosed consideration of the precise claim (Appellants Brief Page 9). This is simply not true as Hagans, supra, page 539, states:

> "We are not aware of any cases in this Court specifically dealing with this or any similar regulations and settling the matter one way or the other." (Emphasis added)

If the Appellants' precise claim argument were followed to its logical conclusion, no lower court judge could ever dismiss a claim if a plaintiff has enough imagination. Even if this present lower court decision were eventually upheld by the Supreme Court, the plaintiffs could success-

fully argue that failure to grant travel expenses of a recipient raised a not insubstantial claim where the recipient was required to appear at a fair hearing at the district office. Or that a not insubstantial claim was raised because a welfare recipient or a member of the working poor was not granted travel expenses because of a required civil court appearance such as a divorce action.

The state, by requiring AFDC recipients to come to the district office, has not invidiously discriminated between any class of recipient. All AFDC recipients in Connecticut get the same amount of money in their flat grant based on family size plus extra payments in certain cases of high rent. The problem arises because the Appellants have freely chosen to live in a certain area of the state. Geographical considerations can cause different transportation problems and add travel expenses to the every day living of the recipient such as getting to the store for shopping. The recipients who live across the street from a district office can have a baby sitting

problem when required to visit the district office. The recipient who lives across town can have a 70 cent round trip bus fare expense to get to the district office. Where would the Court be expected to stop second guessing public officials on where the discrimination started?

In the recent case of Randall v. Goldmark, 495 F.2d 356, the Court of Appeals for the First Circuit dismissed a complaint after finding the constitutional claim to be wholly insubstantial and refused to consider the pendent statutory claim where the Massachusetts Welfare Department had reduced an AFDC mother's shelter allowance by the amount her separated spouse paid toward the house mortgage. The Court stated at page 359:

> "There can be no equal protection violation where the Department, for permissive reasons,...treats all recipients alike, even though the result may occasionally lead to some disparity in housing consequences."

In Dublino v. New York State Department of Social Services, 348 F.Supp. 290, the Court held that public assistance

recipients who had to travel to the welfare office to personally pick up their semimonthly welfare checks did not have their equal protection rights violated.

> "There is no evidence that the state has singled out those with transportation hardships as targets for special classification or special treatment." Dublino, supra, Page 298.

In the present case, no evidence has been presented that the Appellants were singled out for special classification or special treatment.

The real question here appears to be does the fact that a recipient suffers some inconvenience and some slight expense raise a substantial equal protection issue, and is a state welfare department constitutionally required to pay for any and all small expenses that a recipient might incur which the department did not include in his monthly budget. Both Dandridge and Jefferson are emphatic that there is no equal protection deprivation. See also Rosado v. Wyman, 397 U.S. 397.

The Appellants' problem, despite their present denial of the fact, arises out of their geographical location in

relation to the district office that services them. Appellees believe that the cases cited by the lower court correctly dispose of that equal protection claim.

Reynolds v. Sims, 377 U.S. 533, which the Appellants claim rebuts the territorial argument, is completely distinguishable on the factual situation which it presented. This case dealt with a deliberate gerrymandering of voting districts in Alabama so that a smaller rural electorate could outvote the majority. Yet even Reynolds recognized that mathematical nicety is not a constitutional requirement and specifically said that it was basing the decision on the deliberate gross inequality in the voting district population. Reynolds, supra, page 569.

The lower court's analysis that some financial hardship on those who live farther than others from the district offices did not raise a substantial equal protection claim is a sound one and the cases cited by it, i.e. Ortwein v. Schwab, 410 U.S. 656 and United States v. Kras, 409 U.S. 434 are persuasive.

Paying for travel expenses, or baby sitter expenses, though burdensome, does not rise to the dignity of an equal protection deprivation. The San Antonio Independent School District case is very clear on this subject where it interpreted Douglas v. California, 372 U.S. 353, and other cases where it stated that persons who had a large financial burden, but not an insurmountable burden, would not get equal protection relief. San Antonio Independent School District, supra, Page 21. As this case stated:

> "A sufficient answer to Appellees' argument is that, at least where wealth is involved, the equal protection clause does not require absolute equality or precisely equal advantages." San Antonio Independent School District, supra, page 24.

III

THE DUE PROCESS CLAIM OF THE APPELLANTS IS COMPLETELY LACKING IN SUBSTANTIALITY.

The Appellants claim that the state has violated their due process rights by irrebuttably presuming that the AFDC grant includes transportation and baby sitting expenses is even less substantial than their equal protection argument.

Those cases dealing with irrebuttable presumption hold that a plaintiff should be allowed to demonstrate in court that they do not come within that class of persons who are receiving unfavorable treatment. Therefore, it follows that the state has set up two (2) classes, i.e. the favored one and the unfavored one.

In Vlandis v. Kline, 412 U.S. 441, cited by the Appellants in their lower court brief, the Supreme Court merely held that college students must be accorded the

right to prove that they are bona fide residents of the state where they go to college. Vlandis did not set forth the proposition that all students in state colleges must be irrebuttably presumed to be bona fide residents.

In Heiner v. Donner, 285 U.S. 312, cited by the Appellants in their appeal brief, the Court merely held that the plaintiff must be allowed to demonstrate that a transfer of property made within two years of death was not in contemplation thereof. The plaintiff did not claim that the tax could not be laid in any case where the gift was made within two years of death. See also Bill v. Burson, 402 U.S. 535, dealing with a favored class of drivers who were involved in accidents.

In the present case the State Welfare Department's policy is to pay no AFDC recipient travel expenses or baby sitter expenses when they come into the district office for a redetermination of eligibility hearing. The state has set forth a completely neutral policy favoring no group within the AFDC class. Neither have they done any-

thing to prevent the Appellants from moving next door to the district office if they so desired. All the state has done is set up a requirement that every AFDC recipient must be interviewed to redetermine their eligibility every six (6) months, and the state has decided not to cover travel expenses. This decision of the state to decide what expenses it will or will not pay has been upheld on several occasions by the Supreme Court. King v. Smith, 392 U.S. 309. Rosado v. Wyman, 397 U.S. 397.

The Appellants do not appear to have pursued their argument on procedural due process in their brief, and, therefore, it should be considered as abandoned. However, the Appellee would point out that in the recent decision of Prunczak v. Weinberger, 375 F.Supp. 152, where the plaintiff, who was also to appear at a hearing before the Appeals Council on the rejection of his social security claim, argued he was denied due process because the Department of Health, Education and Welfare refused to pay travel expenses for himself and his attorney, the Court held said refusal was not a denial of due process.

IV

ONCE THE FOURTEENTH AMENDMENT CLAIMS WERE FOUND TO BE INSUBSTANTIAL, THE COURT HAD NO JURISDICTION TO HEAR THE APPELLANTS' STATUTORY CLAIMS.

The Appellants have come up with the novel argument that alleging a conflict between a federal statute and a state regulation states a supremacy clause constitutional issue sufficient to give the federal court jurisdiction pursuant to 28 U.S.C. 1343 (3)(4). This claim is completely without merit. The Appellants have cited no Supreme Court cases to support their argument.

The purpose of 1343 (3) is to enforce the claims of deprivation of the Fourteenth Amendment equal protection rights. Davis v. Foreman, 251 F.2d 421, 422, cert. denied 356 U.S. 974. See also Hackin v. Lockwood, 361 F.2d 499, 500, cert. denied 385 U.S. 960. Holt v. Indiana Manufacturing Co., 176 U.S. 68.

Since the lower court found that no Fourteenth Amendment rights were violated, there was no jurisdiction left for the Court to proceed to pass on the pendent statutory claims.

Even though the rule, that the lower court, once it has found the constitutional issue insubstantial, refuses to hear the pendent statutory claim, has been criticized as a "maxim more ancient than analytically sound..." Rosado, supra, Page 404, it is still the prevailing law. See Hagans v. Lavine, 39 L.Ed.2d 577, 588.

> "The substantiality doctrine as a statement of jurisdictional principle affecting the power of a federal court to adjudicate constitutional claims has been questioned,...But it remains the federal rule and needs no reexamination here..."

In fact, this was one issue in Hagans in which even the dissent agreed.

> "This Court, however, has never held, and does not hold now, that the Supremacy Clause of the Constitution itself provides a basis for jurisdiction under this section." Hagans, supra, Page 597.

The Appellants argument that 1343 (4) should give the Court jurisdiction is even less meritorious because 1343 (4) was passed specifically to protect civil rights. A reading of the federal statutes, which the Appellants claim are involved in the present appeal, i.e. 42 U.S.C. 602 (a)(1) and 602 (a)(10) and 42 U.S.C. 606 (b)(1), are not civil rights statutes, but deal instead with property rights.

V

THE APPELLANTS STATUTORY CLAIMS ARE COMPLETELY WITHOUT MERIT.

Even if this Court believed that the lower court should have gone on to decide the pendent statutory claims, the Appellants would not prevail.

Unless the federal statute clearly and specifically states that the State Welfare Department must pay all expenses which arise in the course of the recipient's dealings with the Department, then the Court should not make this type of finding by judicial decree.

"The starting point of the statutory analysis must be the recognition that the federal law gives the state great latitude in dispensing its available funds." Dandridge, supra, page 471.

"If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." New York State Department of Social Services v. Dublino, 413 U.S. 405, 413.

Applying these principles of law to the specific statutes, it is obvious that they do not stand for the proposition which the Appellants urge. In the two (2) occasions that the Supreme Court has had to state the purpose of 42 U.S.C. 602 (a)(10), the Court has said that the purpose was to give aid promptly so that potential recipients would not be kept on a waiting list even though there was a shortage of state funds. Jefferson, supra, page 544. Dandridge, supra, page 480, 481.

There is no case sustaining the proposition that 602 (a)(10) should mean that if the state does not give the recipient extra money because of territorial differences that the state has not furnished aid promptly.

As for 42 U.S.C. 602 (a)(1), the only meaning that can be attributed to this section is that the state plan for AFDC could not be initiated in one part of the state and not in the other. In other words, residents of a town, or towns, could not be excluded from participation in the AFDC program.

A fair reading of 42 U.S.C. 606 (b)(1) clearly demonstrates that Congress was merely defining what the AFDC program meant. This definition showed that aid would consist of money payments at stated intervals plus medical care. To read plaintiffs interpretation of this statute strains the ordinary common sense meaning of the words and their use in the context of that section.

Interestingly, HEW, which is charged with the administration of the program, and whose interpretation of the statutes should be accorded great deference, Udall v. Tallman, 380 U.S. 1, 16, has never passed any regulations which hold that the AFDC recipient is entitled to free transportation or baby sitting costs when he is obliged to come into the district office. Yet, the Secretary had obviously given thought to payment of this type of cost in other regulations. See 45 C.F.R. 249.10 (a)(5) directing the state to provide transportation in some aspects of the medical program promulgated under 42 U.S.C. 1396.

Because the Secretary specifically included transportation in one program, and deliberately omitted it in another, the only inference that can be drawn from this omission can be that the Department did not intend the recipient to be entitled to transportation in the AFDC program.

## CONCLUSION

The Appellees respectfully request the Court to sustain the decision of the District Court.

Respectfully submitted,

Francis J. MacGregor
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114

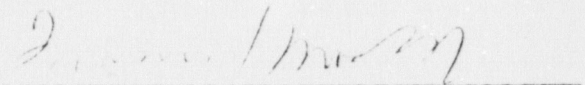
CERTIFICATION

This is to certify that on the 27th day of March, 1975, two copies of the foregoing Brief of Appellee were mailed to the following counsel of record:

James C. Sturdevant, Esq.
Tolland-Windham Legal Assistance Program
35 Village Street - P.O. Box 358
Rockville, Connecticut 06066

Charles A. Pirro, III, Esq.
Fairfield County Legal Services, Inc.
33 South Main Street
South Norwalk, Connecticut 06854

David B. Spanier, Esq.
Legal Aid Society of Hartford County
525 Main Street
Hartford, Connecticut 06103



Francis J. MacGregor
Assistant Attorney General
90 Brainard Road
Hartford, Connecticut 06114

Attorney for Appellees